No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide various monetary benefits to certain eligible individuals. The Act directs the Commissioner of Social Security to adjudicate applications for benefits, and it authorizes judicial review of "any final decision of the Commissioner of Social Security made after a hearing to which [the plaintiff] was a party." 42 U.S.C. 405(g); see 42 U.S.C. 1383(c)(3). Petitioner filed an application for supplemental-security-income benefits under Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, and an administrative law judge (ALJ) denied petitioner's claim after a hearing. Petitioner filed a request for review of the ALJ's decision with SSA's Appeals Council. The Appeals Council dismissed petitioner's request for review, finding that it was untimely under an SSA regulation and that petitioner had not shown good cause for missing the deadline. See 20 C.F.R. 416.1468(a) and (b). SSA's regulations provide that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review," 20 C.F.R. 416.1472, and that in such circumstances the ALJ's decision "is binding on all parties," 20 C.F.R. 416.1455. The question presented is:

Whether a decision of the Appeals Council dismissing as untimely a request for review of a decision issued by an ALJ after a hearing is a "final decision of the Commissioner of Social Security made after a hearing" that is subject to judicial review under 42 U.S.C. 405(g).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 813. The orders of the district court granting respondent's motion to dismiss (Pet. App. 22a-26a) and denying petitioner's subsequent motion for relief under Federal Rule of Civil Procedure 59(e) (Pet. App. 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2018. On April 19, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 25, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. *Statutory framework.* The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide monetary benefits to certain eligible individuals under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program" that "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental-security-income benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75.

When benefits are sought under either program, the Act directs the Commissioner of Social Security "to make findings of fact, and decisions as to the right of any individual applying for a payment." 42 U.S.C. 405(b)(1) (Title II); see 42 U.S.C. 1383(c)(1)(A) (Title XVI). The Act establishes certain minimum procedural requirements that the Commissioner must observe in adjudicating applications for benefits. For example, if the Commissioner renders a decision adverse to a claimant, the decision must contain (*inter alia*) an explanation of the Commissioner's reasons, and upon request the Commissioner must provide the claimant notice and an opportunity for a hearing for review of that decision. See *ibid.*

The Act also provides that a final decision made after a hearing is subject to judicial review. 42 U.S.C. 405(g). Section 405(g) provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action" in federal district court "commenced within sixty days after

the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." *Ibid.* (Title II proceedings); see 42 U.S.C. 1383(c)(3) (making the Commissioner's "final determination[s]" regarding supplemental-security-income benefits under Title XVI "subject to judicial review as provided in section 405(g) of [Title 42] to the same extent as the Commissioner's final determinations under section 405"). The Commissioner's findings and decision are "binding upon all individuals who were parties to such hearing" and may not be reviewed except as provided in the Act. 42 U.S.C. 405(h).

Subject to those and other requirements established by the Act itself, the Act grants SSA broad discretion to shape administrative procedures for adjudicating benefits applications under Titles II and XVI. The Act authorizes the Commissioner "to make rules and regulations and to establish procedures, not inconsistent with the provisions of th[e] [Act], which are necessary or appropriate to carry out" the Act's provisions. 42 U.S.C. 405(a); see 42 U.S.C. 1383(d)(1). The Commissioner is "further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper." 42 U.S.C. 405(b)(1), 1383(c)(1)(A).

b. *SSA administrative-review process.* Exercising those authorities, SSA has established a multi-step administrative process through which it adjudicates claims for

benefits. See 20 C.F.R. 416.1400.[1] At each step of the process, SSA's determination or decision generally becomes binding on the claimant unless the claimant pursues further review in accordance with SSA's regulations.

i. *Initial and reconsideration determinations.* A person who applies for benefits first receives an initial determination. 20 C.F.R. 416.1400(a)(1), 416.1404(a). If the claimant is dissatisfied with the initial determination, he or she can seek reconsideration. 20 C.F.R. 416.1400(a)(2). If the claimant does not timely seek reconsideration, the initial determination becomes binding. 20 C.F.R. 416.1405. If the claimant does timely request reconsideration, the agency will conduct further proceedings and render a reconsideration determination. See 20 C.F.R. 416.1413-416.1422.

ii. *ALJ hearing and decision.* If the claimant is dissatisfied with the reconsideration determination, he or she may then request a hearing before an administrative law judge (ALJ). 20 C.F.R. 416.1400(a)(3); see 20 C.F.R. 416.1429-416.1433. The request must be filed within 60 days of receipt of the reconsideration determination, unless the agency extends the deadline for good cause. 20 C.F.R. 416.1433(b) and (c); see 20 C.F.R. 416.1411 (considerations relevant to good-cause determination). If an ALJ hearing is timely requested, the ALJ will ordinarily conduct an oral hearing and receive additional

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[1] Because this case involves supplemental-security-income benefits under Title XVI, this brief cites the regulatory provisions applicable to Title XVI cases. Parallel provisions exist for Title II benefits. See generally 20 C.F.R. 404.900 *et seq.* During the pendency of petitioner's claim for benefits and this litigation, the regulations have been modified in various respects not relevant to the issue presented in the petition. For simplicity and consistency, this brief refers to the regulatory provisions currently in force unless indicated otherwise.

submissions, and then the ALJ typically will issue a decision. See 20 C.F.R. 416.1446, 416.1449-416.1453; 20 C.F.R. 416.1448 (listing circumstances in which oral hearing may be waived). An ALJ may instead issue a recommended decision and transfer the case to the Appeals Council, 20 C.F.R. 416.1453(d), a body within SSA that reviews ALJ decisions, 20 C.F.R. 416.1467.

If instead a claimant submits an untimely request for an ALJ hearing and does not demonstrate "good cause for missing the deadline," 20 C.F.R. 416.1433(c), the ALJ will "dismiss" the hearing request. 20 C.F.R. 416.1457(c)(3). If the claimant believes that the ALJ's dismissal of a hearing request was erroneous, the regulations permit the claimant within 60 days to request that the ALJ or the Appeals Council vacate the ALJ's dismissal. 20 C.F.R. 416.1460(a). The ALJ or the Appeals Council also may vacate the dismissal *sua sponte*. *Ibid.* The regulations state that "[t]he dismissal of a request for a hearing is binding, unless it is vacated by an administrative law judge or the Appeals Council." 20 C.F.R. 416.1459. SSA has interpreted this regulation to mean that "an ALJ's order finding no good cause for a late hearing request and dismissing the request as untimely is not subject to judicial review." SSAR 16-1(7), 81 Fed. Reg. 13,438, 13,439 (Mar. 14, 2016). With exceptions not implicated here, unless the claimant seeks and obtains an ALJ hearing, the reconsideration determination is binding. 20 C.F.R. 416.1421.

iii. *Appeals Council review.* If a claimant is dissatisfied with an ALJ's decision, he or she may request review by the Appeals Council. 20 C.F.R. 416.1400(a)(4). To do so, the claimant must file a written request for review within 60 days after receiving notice of the ALJ's decision, unless the agency extends that deadline for good cause. 20 C.F.R.

416.1468(a) and (b); 20 C.F.R. 416.1411 (good-cause considerations). If the claimant timely requests review (or the untimely filing is excused), the Appeals Council may then either grant or deny review. 20 C.F.R. 416.1467, 416.1481; see 20 C.F.R. 416.1470 (2014) (setting forth criteria for cases Appeals Council will review); 20 C.F.R. 416.1470 (2018) (similar but establishing additional limitations on circumstances in which Appeals Council will consider new evidence); 20 C.F.R. 416.1469 (Appeals Council may also initiate review on its own motion).

If the Appeals Council grants review, it will subsequently either issue a decision on the merits of the claimant's claim or remand the case to the ALJ for further proceedings. 20 C.F.R. 416.1467, 416.1479. If the Council issues a decision and the claimant is dissatisfied with the decision, he or she may then seek judicial review by filing an action in federal court under 42 U.S.C. 405(g). 20 C.F.R. 416.1400(a)(5). Unless judicial review is sought, that decision becomes binding. 20 C.F.R. 416.1481. If the Appeals Council denies review, then the ALJ's decision becomes SSA's final decision, and the claimant may seek judicial review of SSA's final decision. See 20 C.F.R. 416.1400(a)(5). With exceptions not implicated here, if the Appeals Council denies review and judicial review of the ALJ's decision is not sought, the ALJ's decision becomes binding. 20 C.F.R. 416.1455, 416.1481.

If instead the claimant seeks Appeals Council review but does not file his or her request "within the stated period of time and the time for filing has not been extended," SSA's regulations have long provided that the Appeals Council "will dismiss [the] request for review." 20 C.F.R. 416.1471; see *ibid.* (Appeals Council also may dismiss request for review upon parties' request or death of claimant with no survivor or other parties); see also

25 Fed. Reg. 1677, 1682 (Feb. 26, 1960) (20 C.F.R. 404.952(c) (1961)). Since 1980, the regulations have further provided that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. 416.1472; see 45 Fed. Reg. 52,078, 52,096, 52,104 (Aug. 5, 1980). SSA has interpreted this regulation to mean that "an Appeals Council dismissal is not a 'final decision of the Commissioner of Social Security made after a hearing'" and thus "is not judicially reviewable." SSAR 99-4(11), 64 Fed. Reg. 57,687, 57,689 (Oct. 26, 1999); see also 20 C.F.R. 416.1403(a)(8) (stating that a denial of a request to extend the time for seeking review is "not subject to the administrative review process" and is "not subject to judicial review").[2]

2. a. In 1987, petitioner filed an application for supplemental-security-income benefits under Title XVI on the basis of disability. Pet. App. 3a. In 1988, an ALJ

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[2] SSA's regulations provide for two other forms of review in limited circumstances. First, the regulations establish an "expedited appeals process" for cases in which the claimant and SSA agree that "the only factor preventing a favorable" ruling for the claimant "is a provision in the law that [the claimant] believe[s] is unconstitutional." 20 C.F.R. 416.1424(d); see 20 C.F.R. 416.1423-416.1428; *cf. Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975) (discussing permissibility of dispensing with full exhaustion through Appeals Council in such circumstances). That procedure may be commenced at various points during the administrative-review process after issuance of a reconsideration determination until the Appeals Council has acted. See 20 C.F.R. 416.1424(a), 416.1425(a). Second, a claimant may request, or SSA on its own motion may choose, to reopen and revise a determination or decision even if the claimant did not timely request administrative review. 20 C.F.R. 416.1487; see 20 C.F.R. 416.1488-416.1489 (specifying deadlines and available grounds for seeking reopening); see also *Califano* v. *Sanders*, 430 U.S. 99, 104-109 (1977) (holding that denial of reopening is not judicially reviewable absent a constitutional claim). Neither of these alternative avenues for review is at issue here.

issued a favorable ruling, and petitioner began receiving benefits. *Ibid.* Those benefits continued until 2004, when they were terminated because petitioner's resources were found to be over the resource limit. *Ibid.*

b. i. In 2012, petitioner filed a new application for supplemental-security-income benefits, alleging that additional medical conditions had resulted from his original disability. Pet. App. 3a. In its initial determination, SSA denied petitioner's new application, and upon reconsideration SSA again denied his claim. *Ibid.*

Petitioner filed a timely request for a hearing before an ALJ. Pet. App. 3a. On February 18, 2014, an ALJ conducted a hearing on petitioner's application. *Id.* at 22a-23a. On March 26, 2014, the ALJ issued a decision (signed on his behalf by another ALJ) denying petitioner's application based on a finding that petitioner was not disabled within the meaning of the Social Security Act. *Id.* at 3a; D. Ct. Doc. 8-1, at 4-15 (Mar. 14, 2016). Pursuant to SSA's regulations, the notice of decision sent to petitioner advised him that he had 60 days to file a written appeal in order to obtain review by the Appeals Council and that an untimely appeal would be dismissed unless petitioner could "show [he] had a good reason for not filing it on time." D. Ct. Doc. 8-1, at 4; see 20 C.F.R. 416.1472.

ii. According to petitioner, on April 24, 2014—within the 60-day period for appealing—his counsel sent a letter via first-class U.S. mail to the Appeals Council requesting review. Pet. 6; see Pet. App. 3a-4a & n.1. Petitioner further alleges that, on September 21, 2014, his counsel sent a fax to SSA inquiring about the status of petitioner's request for Appeals Council review and attaching a copy of his April 24, 2014, letter requesting review. See *ibid.*; Pet. 6; see also D. Ct. Doc. 8-1, at 18-20 (letter

from petitioner's counsel dated April 24, 2014, requesting review); *id.* at 24 (fax cover sheet from petitioner's counsel dated September 21, 2014, referring to "appeal" "mailed to the Appeals Council" on April 24). Petitioner asserts (Pet. 6-7) that, on October 1, 2014, an SSA claims representative responded by letter to the September 21 fax from petitioner's counsel, stating that SSA had not received petitioner's April 24 letter requesting Appeals Council review. Petitioner contends (Pet. 7) that the claims representative mailed a completed request-for-review form for petitioner to the Appeals Council and informed petitioner that his appeal request was deemed filed as of October 1. See Pet. App. 3a-4a. Petitioner asserts (Pet. 7) that he also mailed to the Appeals Council a copy of his April 24 letter requesting review and a statement by his counsel affirming that the letter was sent on April 24.

SSA records, however, reflect that SSA did not receive either a letter sent by mail in April 2014 from petitioner's counsel requesting Appeals Council review, or a fax on September 21, 2014. Instead, an SSA official responsible for processing claims for Title XVI benefits in Kentucky stated in a sworn declaration that, based on her review of SSA's records, the first correspondence SSA received in petitioner's case following the ALJ's decision was a fax from petitioner on October 1, 2014, including an undated request-for-review form, a letter dated April 24, and a fax cover sheet dated September 21. See D. Ct. Doc. 8-1, at 3.

iii. On November 6, 2015, the Appeals Council issued an order dismissing petitioner's appeal as untimely under 20 C.F.R. 416.1471. Pet. App. 4a; see D. Ct. Doc. 8-1, at 25-28. The order stated that "[t]he request for review filed on October 1, 2014, was not filed within 60

days from the date notice of the decision was received as required by 20 C.F.R. 416.1468(a)." D. Ct. Doc. 8-1, at 27. The order explained that, although the deadline could be extended retroactively "if good cause is shown for missing the deadline," the Appeals Council "f[ound] that there is no good cause to extend the time for filing" here. *Ibid.* The order stated that "[petitioner's] representative submitted a good cause statement on October 1, 2014 indicating he had previously filed a brief on April 24, 2014"—apparently a reference to the letter requesting Appeals Council review that petitioner alleges his counsel sent on April 24—but that "[SSA] did not receive this brief before October 1, 2014," and petitioner's counsel had not "supplied evidence indicating it was sent within the appropriate period of time." *Ibid.* The Appeals Council "dismiss[ed] [petitioner's] request for review," stating that "[t]he [ALJ's] decision stands as the final decision of the Commissioner." *Ibid.* SSA's cover letter enclosing the Appeals Council's order stated that, "[u]nder our rules, the dismissal of a request for review is final and not subject to further review." *Id.* at 25.

3. a. Petitioner brought this action against the Acting Commissioner in the Eastern District of Kentucky seeking review of the Appeals Council's dismissal of his request for review. Pet. App. 4a, 23a. The Acting Commissioner moved to dismiss for lack of jurisdiction and failure to state a claim, or alternatively for summary judgment, arguing that the Appeals Council's order dismissing petitioner's request for review was not a "final decision" subject to judicial review under 42 U.S.C. 405(g). See D. Ct. Doc. 8, at 2 (Mar. 14, 2016). The Acting Commissioner contended that, under SSA's regulations, "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review," and

that "it is only after the Appeals Council has *denied* review, or has *granted* review and issued its own decision, that the Commissioner has rendered a 'final decision' on the claim for benefits, which then is subject to judicial review pursuant to 42 U.S.C. § 405(g)." *Ibid.* (citing 20 C.F.R. 416.1472).

The district court granted the Acting Commissioner's motion to dismiss. Pet. App. 22a-26a. The court reasoned that, under SSA's regulations, "[r]eview by a federal court is only available once a claimant has completed all of the steps of the administrative process." *Id.* at 24a. The court concluded that "a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review, absent the presence of a colorable constitutional claim." *Id.* at 25a. The court relied on SSA's regulation specifying that a decision of the Appeals Council dismissing a request for review as untimely is "binding and not subject to further review," *id.* at 24a (citing 20 C.F.R. 416.1472), and on Sixth Circuit precedent, see *id.* at 24a-25a.

The district court also determined that petitioner had not pleaded a "colorable constitutional claim," rejecting (as relevant) petitioner's contention that the Due Process Clause, U.S. Const. Amend. V, compelled a finding that the request for review had been timely. Pet. App. 25a. The court noted that petitioner had not "offer[ed] any proof that he mailed his written request on April 24, 2014, aside from his own testimony." *Ibid.* The court explained that, "[a]bsent independent evidence, such as a postmark or dated receipt," it "c[ould]not reverse the Appeals Council's determination" of untimeliness. *Ibid.*

Petitioner moved for relief from the judgment under Federal Rule of Civil Procedure 59(e). Pet. App. 16a. The district court denied the motion. *Id.* at 16a-21a.

b. The court of appeals affirmed. Pet. App. 1a-15a. The court observed that, under SSA's regulations, a dismissal by the Appeals Council "is binding and not subject to further review," and that "[j]udicial review is available only after administrative exhaustion." *Id.* at 5a (citing 20 C.F.R. 416.1400(a)(5), 416.1471, 416.1472). The court noted that it "ha[d] not directly addressed * * * in a published opinion" whether such Appeals Council dismissals are reviewable under 42 U.S.C. 405(g), but that it had previously held judicial review was not available in a "similar" context where an ALJ dismissed as untimely a request for an ALJ hearing. See Pet. App. 6a (citing *Hilmes* v. *Secretary of Health & Human Servs.*, 983 F.2d 67, 68 (6th Cir. 1993)).

The court of appeals explained that *Hilmes* relied on *Califano* v. *Sanders*, 430 U.S. 99 (1977), which had "held that judicial review of a denial of a petition to reopen a prior final decision is unavailable in the absence of a colorable constitutional claim." Pet. App. 5a. As the court of appeals observed, *Sanders*

> reasoned that[] "an interpretation that would allow a claimant judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [42 U.S.C. 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits."

Id. at 5a-6a (quoting *Sanders*, 430 U.S. at 108). *Hilmes* "followed the *Sanders* rationale and held that the dismissal of [an ALJ] hearing request as untimely was unreviewable." *Id.* at 6a (citing *Hilmes*, 983 F.2d at 69-70).

The court of appeals here observed that, "[i]n subsequent unpublished cases, [it] ha[d] applied the *Sanders* and *Hilmes* rules to hold that an order from the Appeals Council dismissing a plaintiff's appeal as untimely is not a 'final decision' as defined by the Social Security Act and regulations." *Ibid.* The court adopted that same conclusion in its published decision in this case. *Id.* at 8a ("[W]e conclude that Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court.").

The court of appeals noted that its position accorded with "the majority view * * * that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of such requests do not constitute 'final decisions' reviewable by district courts," citing decisions of seven other courts of appeals. Pet. App. 7a-8a (citing *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998); *Bacon* v. *Sullivan*, 969 F.2d 1517, 1520 (3d Cir. 1992); *Matlock* v. *Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990); *Harper ex rel. Harper* v. *Bowen*, 813 F.2d 737, 743 (5th Cir.), cert. denied, 484 U.S. 969 (1987); *Adams* v. *Heckler*, 799 F.2d 131, 133 (4th Cir. 1986); *Smith* v. *Heckler*, 761 F.2d 516, 518 (8th Cir. 1985); and *Dietsch* v. *Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983)). Only the Eleventh Circuit, the court of appeals continued, had reached a contrary conclusion, in its 1983 decision in *Bloodsworth* v. *Heckler*, 703 F.2d 1233.[3]

The court of appeals specifically endorsed the reasoning of the Eighth Circuit in *Smith*, which had stated that an Appeals Council dismissal of a request for review as untimely "does not address the merits of the

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[3] As noted below, the Seventh Circuit had recently issued a decision reaching the same result as *Bloodsworth*. See *Casey* v. *Berryhill*, 853 F.3d 322, 326 & n.1 (2017); p. 28, *infra*.

claim, and thus cannot be considered appealable, as can the Appeals Council's decisions and denials of *timely* requests for review." Pet. App. 7a (quoting *Smith*, 761 F.2d at 518). The court of appeals here further echoed the Eighth Circuit's observation that, "[i]f the claimant may obtain review in this situation," then "the Secretary's orderly procedures for processing disability claims mean little or nothing," and "any claimant could belatedly appeal his claim at any time and always obtain district court review of an ALJ's decision." *Id.* at 7a-8a (quoting *Smith*, 761 F.2d at 518).

The court of appeals additionally determined that petitioner did not have a colorable due process claim that would be reviewable under 42 U.S.C. 405(g) notwithstanding what it held to be the general preclusion of judicial review of a dismissal of an untimely request for Appeals Council review. Pet. App. 8a-14a. The court observed that "[t]he use of constitutional language to dress up a claim 'does not convert the argument into a colorable constitutional challenge.'" *Id.* at 8a (citation omitted). As relevant here, the court rejected petitioner's contention that the Appeals Council violated his due process rights by refusing to consider what petitioner maintains was a timely-submitted request for review, citing the "lack of independent evidence" to corroborate petitioner's assertion that he in fact submitted his request on time. *Id.* at 10a.

DISCUSSION

Petitioner contends (Pet. 16-21) that the court of appeals erred in concluding that the decision of the Appeals Council dismissing his request for review on the ground that it is untimely is not a "final decision" subject to judicial review under 42 U.S.C. 405(g). Petitioner additionally contends (Pet. 8-13) that the courts of appeals are divided on that question. The decision below accords with

the position maintained for many years by SSA and, until recently, by all but one of the courts of appeals that have addressed the issue. In light of a recent decision of the Seventh Circuit giving currency to the issue and deepening the conflict among the courts of appeals, however, the government has reexamined the question and concluded that its prior position was incorrect. The government has further concluded that this Court's review is warranted to resolve the circuit conflict and that this case is a suitable vehicle for this Court's review of the question. If the Court grants plenary review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

1. The court of appeals held that "Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court" under 42 U.S.C. 405(g). Pet. App. 8a. We have concluded that that position is incorrect.

a. The availability of judicial review of SSA's adjudication of an application for benefits under Title II or Title XVI of the Social Security Act is governed by 42 U.S.C. 405(g). Section 405(g) authorizes any party to an SSA proceeding on an application for Title II benefits to "obtain a review" in federal district court of "any final decision of the Commissioner of Social Security made after a hearing." *Ibid.* Section 405(h) makes Section 405(g)'s mechanism the exclusive avenue for judicial review of Title II benefits determinations. 42 U.S.C. 405(h) (providing that "[n]o findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided," and barring suits against the United States or its officers under 28 U.S.C. 1331 and 1346 (2012 & Supp. V 2017) "to recover on any claim arising under" Title II);

see *Mathews* v. *Eldridge*, 424 U.S. 319, 327 (1976). Title XVI, in turn, incorporates Section 405(g) for cases involving supplemental-security-income benefits, which petitioner sought here, providing that "[t]he final determination of the Commissioner * * * after a hearing" is "subject to judicial review as provided in section 405(g) * * * to the same extent as the Commissioner's final determinations under section 405." 42 U.S.C. 1383(c)(3).

By its terms, Section 405(g) permits judicial review if and only if the Commissioner has rendered "a 'final decision' * * * after a 'hearing.'" *Eldridge*, 424 U.S. at 328 (quoting 42 U.S.C. 405(g)). The Court has held that "this condition consists of two elements": a "jurisdictional," "nonwaivable * * * requirement that a claim for benefits shall have been presented to the [Commissioner]," and a nonjurisdictional, "waivable * * * requirement that the administrative remedies prescribed by the [Commissioner] be exhausted." *Ibid.*; accord *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 15 (2000) (Section 405(g) imposes a "nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court," and an additional requirement that a claimant exhaust "the procedural steps set forth in § 405(g)").[4]

b. The Appeals Council's order dismissing as untimely petitioner's request for review of the ALJ's decision made after a hearing satisfies both requirements. The "nonwaivable" requirement is satisfied because petitioner "presented" his "claim for benefits" to SSA by filing an

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[4] In *Califano* v. *Sanders*, 430 U.S. 99 (1977), the Court explained that it had previously "authorized judicial review under [Section 405(g)]" in cases where enforcing the waivable exhaustion-of-remedies requirement otherwise "would effectively have closed the federal forum to the adjudication of colorable constitutional claims." *Id.* at 108-109 (citing *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Eldridge*, *supra*).

application, *Eldridge*, 424 U.S. at 328; see Pet. App. 3a, and the question whether petitioner timely filed his request for Appeals Council review was also presented to and decided by the agency, Pet. App. 3a-4a; see pp. 8-10, *supra*. As explained below, the waivable exhaustion-of-remedies requirement—that SSA must have rendered a "final decision" made "after a hearing," *Eldridge*, 424 U.S. at 328 (citation and internal quotation marks omitted)—is satisfied as well.

i. There is no dispute that the Appeals Council's decision of which petitioner seeks review was made "after a hearing." 42 U.S.C. 405(g). After receiving SSA's initial and reconsideration determinations, petitioner timely requested a hearing before an ALJ, and a hearing was conducted in February 2014. Pet. App. 3a, 16a. The ALJ subsequently issued a decision on the merits of petitioner's application for benefits. See *ibid.*; D. Ct. Doc. 8-1, at 4-15. Neither the Acting Commissioner nor the courts below therefore questioned that Section 405(g)'s "after a hearing" requirement was met here.[5]

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[5] If the claimant does not seek review by an ALJ within 60 days of the denial of his request for reconsideration, an ALJ would typically "dismiss" the request for a hearing. 20 C.F.R. 416.1457(c)(3). Courts of appeals are divided on whether such dismissals satisfy the requirement that SSA's decision be made "after a hearing" in order to be subject to judicial review. Compare, *e.g.*, *Hilmes* v. *Secretary of Health & Human Servs.*, 983 F.2d 67, 69-70 (6th Cir. 1993) (holding review of dismissal of request for ALJ hearing is not available because no "hearing" has occurred (citation and emphasis omitted)), with *Boley* v. *Colvin*, 761 F.3d 803, 806 (7th Cir. 2014) (holding review is available because "a 'hearing' for the purpose of [Section 405(g)] is a decision after whatever procedures the agency elects to use" in reaching that decision). Because an ALJ hearing occurred here before the Appeals Council dismissed petitioner's request for review, this case does not present that distinct question.

ii. The court of appeals' conclusion that Section 405(g) foreclosed judicial review here rested instead on its determination that the Appeals Council's order dismissing as untimely a request for review of an ALJ decision after a hearing is not a "final decision[]." Pet. App. 8a; see *id.* at 6a-8a. That determination is incorrect when considered in light of ordinary usage and the broader context of finality of administrative decisions.

The Social Security Act "does not define 'final decision.'" *Sims* v. *Apfel*, 530 U.S. 103, 106 (2000). "When a term goes undefined in a statute," the Court typically will "give the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Where an undefined statutory phrase is a "term of art" or otherwise has a well-established meaning in a given statutory context, the Court will consult that meaning. *Magwood* v. *Patterson*, 561 U.S. 320, 332 (2010) (citation omitted); see also, *e.g.*, *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612-613 (1992). Here, both the ordinary meaning of "final" and its familiar meaning in the context of administrative adjudications point to the same conclusion.

In ordinary usage, a decision is "final" if it "[p]ertain[s] to, or occur[s] at, the end or conclusion" of a process, or if it is "[c]onclusive," "[d]ecisive," or "[d]efinitive." *Webster's New International Dictionary of the English Language* 948 (2d ed. 1949). An Appeals Council order dismissing as untimely a request for review of an ALJ decision is final under each of those definitions. SSA's regulations state that such a dismissal "is binding and not subject to further review." 20 C.F.R. 416.1472. The dismissal thus marks the end of SSA's considera-

tion of a benefits application and is conclusive of whether SSA will review the ALJ's decision and consider the claim on the merits.

In the administrative-law context, this Court's precedent ascribes a similar meaning to "final" agency action. For purposes of the availability of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 704, the Court has explained that, "[a]s a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997) (citation omitted). "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (quoting *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Bos. Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

An Appeals Council dismissal order bears both of those "hallmarks of APA finality." *Sackett* v. *EPA*, 566 U.S. 120, 126 (2012). Such an order does not represent a "merely tentative or interlocutory" determination, but instead marks the end of the agency's consideration. *Bennett*, 520 U.S. at 178. SSA's regulations provide that the agency will not "review" the dismissal order further. 20 C.F.R. 416.1472. The dismissal order also has "legal consequences" and determines the claimant's "rights [and] obligations," *Bennett*, 520 U.S. at 178 (citation omitted), because it cements the ALJ's decision regarding the applicant's entitlement to receive the requested benefits, 20 C.F.R. 416.1455 (ALJ's decision

is "binding" if not reviewed); see *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983) (an "Appeals Council decision not to review *finalizes* the decision made after a hearing by the administrative law judge"). Although the APA was enacted in 1946, see ch. 324, 60 Stat. 237—after 42 U.S.C. 405(g) (Supp. V 1939), which was enacted in 1939, see Social Security Act Amendments of 1939, ch. 666, Tit. II, § 201, sec. 205(g), 53 Stat. 1370-1371—the APA codified preexisting principles of judicial review of agency action, see, *e.g.*, *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987), and is instructive on the meaning of "final decision" under 42 U.S.C. 405(g).

c. The court of appeals' reasons for holding that an Appeals Council order dismissing as untimely a request for review of an ALJ decision after a hearing is not a "final decision" are, in the end, insufficient to overcome the foregoing considerations in interpreting Section 405(g).

i. The court of appeals reasoned that such a dismissal is not final because it "does not address the merits of the claim" for benefits. Pet. App. 7a (citation omitted). But Section 405(g) does not by its terms limit judicial review to cases in which the most recent agency ruling addresses the underlying merits. See *Casey* v. *Berryhill*, 853 F.3d 322, 326 n.1 (7th Cir. 2017) ("[Section] 405(g) allows judicial review when a claim has been presented and finally decided, even when that final decision is (or purports to be) a dismissal for untimeliness" (citation and internal quotation marks omitted)). Because the Appeals Council's dismissal "*finalizes* the decision made after a hearing by the [ALJ]," *Bloodsworth*, 703 F.2d at 1239, it makes no difference whether the Appeals Council itself considers the underlying merits in declining to

grant review or dismisses the request on other grounds. That conclusion accords with lower courts' decisions treating agency dismissals on timeliness or other procedural or jurisdictional grounds as final in other contexts.[6] And it aligns with courts of appeals' routine practice of reviewing under 28 U.S.C. 1291 district-court decisions dismissing cases on jurisdictional or procedural grounds.[7]

ii. The court of appeals also relied on SSA's regulations providing that judicial review of an Appeals Council dismissal on timeliness grounds is not available. Pet. App. 5a (citing 20 C.F.R. 416.1400(a)(5), 416.1471, and 416.1472); see *id.* at 6a-8a. And this Court has recognized that, because the Social Security Act does not define "'final decision,'" and because Section 405(a) of the Act grants the Commissioner authority to adopt regulations and procedures implementing the administrative-review scheme, the term's meaning is largely "left to the [Commissioner] to flesh out by regulation." *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975); see *Sims*, 530 U.S. at 106. But SSA's regulations cannot insulate Appeals Council dismissals from the judicial review that Congress expressly made available by

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[6] See, *e.g.*, *Auburn Reg'l Med. Ctr.* v. *Sebelius*, 642 F.3d 1145, 1148 (D.C. Cir. 2011) (agency dismissal on timeliness grounds "is final in any sense of the word"), rev'd on other grounds, 568 U.S. 145 (2013); *Khan* v. *U.S. Dep't of Justice*, 494 F.3d 255, 259-260 (2d Cir. 2007) (reviewing agency decision that administrative appeal was untimely); *Cox* v. *Benefits Review Bd.*, 791 F.2d 445, 446-447 (6th Cir. 1986) (per curiam) (reviewing agency decision that administrative petition for review was insufficient to exhaust administrative remedies).

[7] See, *e.g.*, *Farzana K.* v. *Indiana Dep't of Educ.*, 473 F.3d 703, 708 (7th Cir. 2007); *Loya* v. *Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 281 (9th Cir. 1983); *Athens Cmty. Hosp., Inc.* v. *Schweiker*, 686 F.2d 989, 993 (D.C. Cir. 1982), modified on reh'g, 743 F.2d 1 (D.C. Cir. 1984).

statute. Section 405(g) unambiguously provides for judicial review of "final decision[s]" by SSA "made after a hearing." 42 U.S.C. 405(g). Because an Appeals Council order dismissing as untimely an appeal of an ALJ decision after a hearing is a final decision made after hearing, see pp. 17-21, *supra*, it is judicially reviewable under Section 405(g), and the agency cannot alter that result by regulation.

To be sure, Section 405 grants the Commissioner discretion to "specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." *Salfi*, 422 U.S. at 766. SSA thus may establish the steps of the administrative-review process and may determine, within the limits set by the statute, when that process ends and judicial review may be sought. As a result, SSA generally may choose whether to continue considering a particular claim for benefits, or instead to terminate its consideration, make its ruling binding, and allow judicial review.

It does not follow from that discretion to adopt procedural exhaustion requirements, however, that SSA may provide for the Appeals Council to decline to review an ALJ's adjudication of the merits—rendering the ALJ's decision binding—based on the agency's determination that the claimant failed to comply with the agency's procedural requirements, while simultaneously foreclosing any judicial review of that determination that the procedural requirements were not satisfied. *Bloodsworth*, 703 F.2d at 1239. The court of appeals concluded that petitioner was barred from seeking judicial review because the Appeals Council determined that petitioner had not timely submitted a request for review to the Appeals Council and had not shown good cause for missing the deadline. Pet. App. 5a-8a. But it is the Appeals

Council's determination that petitioner did not timely submit his request for review to the Appeals Council that petitioner seeks to challenge in this action.

iii. The court of appeals also relied on the "rationale" (Pet. App. 6a) of this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977), but the Court's reasoning in *Sanders* does not support the court of appeals' conclusion here. In *Sanders*, this Court held that SSA's denial of a petition to reopen a prior final decision was not a "final decision" subject to judicial review under Section 405(g). 430 U.S. at 108. The Court explained that "the opportunity to reopen final decisions * * * [is] afforded by the Secretary's regulations and not by the Social Security Act." *Ibid.* It further reasoned that "allow[ing] a claimant judicial review simply by filing—and being denied—a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [Section 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits." *Ibid.* "In other words, one opportunity for judicial review is enough," and "a claimant who bypasses that chance cannot create another by a procedure that would evade a statutory deadline." *Boley* v. *Colvin*, 761 F.3d 803, 807 (7th Cir. 2014).

As the Eleventh Circuit has explained, however, "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth*, 703 F.2d at 1237. Reopening "is an extraordinary measure, affording the opportunity of a second excursion through the decision making process." *Id.* at 1238. In contrast, review by the Appeals Council is "a normal stage in the administrative review procedure, available as of right to any party." *Id.*

at 1237. It is not "a bonus opportunity" for review after the ordinary process of direct administrative review has been completed, but part of that process of direct review itself. *Id.* at 1238.

In addition, review of the Appeals Council's dismissal order does not enable a claimant who failed to comply with SSA's deadlines for administrative review to evade the consequences of that failure by securing judicial review on the merits. A court reviewing an agency decision is limited to reviewing the grounds the agency gave for its decision. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). If the Appeals Council dismissed a request for review based on its finding that the request was untimely and that good cause to excuse the untimeliness did not exist, a court could not review the merits of the underlying decision denying benefits. Instead, it could review only the Appeals Council's dismissal of the applicant's request for review as untimely. In doing so, moreover, the court would not review the agency's basis for the Appeals Council's dismissal de novo. The court ordinarily could review the agency's factual findings (including that the request for review was untimely) only to "determine whether [they are] supported by 'substantial evidence,'" *Dickinson* v. *Zurko*, 527 U.S. 150, 164 (1999) (citation omitted); see *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971), and the agency's determination not to exercise its discretion to excuse an untimely request for review at most only for an abuse of that discretion. If the court found no reversible error in the agency's decision to dismiss the request for review as untimely, the court could not disturb the agency's ruling on the merits. See *Woodford* v. *Ngo*, 548 U.S. 81, 90-91 (2006). And if the court concluded that the Appeals Council committed reversible

error, the court could only remand to the agency to address the merits. See, *e.g.*, *Casey*, 853 F.3d at 329 (explaining that, because there was "no 'final decision' on the underlying merits," the merits were "a question for the agency to consider on remand").

d. In concluding that the Appeals Council's dismissal of petitioner's appeal as untimely is not judicially reviewable under 42 U.S.C. 405(g), the court of appeals embraced the government's longstanding position, which has been reflected in SSA regulations in force since 1980, see p. 7, *supra*, and which until 2017 had been endorsed by all but one court of appeals to address the issue, see pp. 26-27, *infra*.[8] The government advocated that position in this case. In the district court and the court of appeals, the Acting Commissioner contended that Congress gave the Commissioner discretion to decide what constitutes a "final decision" subject to judicial review under 42 U.S.C. 405(g). Gov't C.A. Br. 8-12; D. Ct. Doc. 8, at 1-2. The government further contended that, in the exercise of that discretion, SSA has validly promulgated regulations providing that an Appeals Council dismissal of a request for review as untimely is not a reviewable final decision. The government has taken that position in many other cases as well.[9]

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[8] Before SSA codified its position in its regulation in 1980s, SSA maintained that the Appeals Council's dismissal of a request for review of an ALJ decision as untimely was not judicially reviewable. See, *e.g.*, *Sheehan* v. *Secretary of Health, Educ. & Welfare*, 593 F.2d 323, 325-326 (8th Cir. 1979) (holding Appeals Council dismissal was not reviewable).

[9] See, *e.g.*, Br. in Opp. at 10 n.4, *Lary* v. *Chater*, 522 U.S. 812 (1997) (No. 96-1849) (arguing in context of Medicare case also governed by Section 405(g) that Appeals Council dismissal was not reviewable).

In light of the petition for a writ of certiorari in this case and the Seventh Circuit's recent contrary decision in *Casey*, *supra*; see p. 28, *infra*, however, the government has now reconsidered its position. The government concludes that the position petitioner advocates here is correct and that, for the reasons stated above, a decision of the Appeals Council dismissing as untimely a request for review of an ALJ decision after a hearing is a "final decision" within the meaning of 42 U.S.C. 405(g).

2. a. As petitioner observes (Pet. 8-12), and as the court of appeals acknowledged (Pet. App. 7a), the courts of appeals are divided on whether Appeals Council dismissal orders on untimeliness grounds are final decisions reviewable under Section 405(g).[10]

The decision below accords with published decisions of the Third, Fifth, Eighth, Ninth, and Tenth Circuits holding that such orders are not reviewable under Section 405(g). See *Bacon* v. *Sullivan*, 969 F.2d 1517, 1519-1522 (3d Cir. 1992); *Harper ex rel. Harper* v. *Bowen*, 813 F.2d 737, 739-743 (5th Cir.), cert. denied, 484 U.S. 969 (1987); *Smith* v. *Heckler*, 761 F.2d 516, 518-519 (8th Cir. 1985); *Matlock* v. *Sullivan*, 908 F.2d 492, 493-494 (9th Cir. 1990); *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 & n.2 (10th Cir. 1998). The First Circuit has reached the same conclusion in an unpublished opinion. See *Rothman* v. *Secretary of Health & Human Servs.*, 70 F.3d 110, 1994 WL

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[10] As noted above, see p. 17 n.5, *supra*, courts of appeals also have disagreed over whether a dismissal of a request for a hearing before an ALJ is reviewable under Section 405(g). Courts of appeals addressing the reviewability of Appeals Council dismissals have sometimes relied in part on decisions addressing dismissals of requests for ALJ hearings. See Pet. App. 6a (citing *Hilmes*, *supra*); *Casey*, 853 F.3d at 326 & n.1 (citing *Boley*, *supra*).

866086, at *1 (Dec. 8, 1994) (Tbl.) (Appeals Council dismissal of request for review as untimely "is not a 'final decision' for the purposes of 42 U.S.C. § 405(g) and thus is not reviewable in federal court."). The Second Circuit has held that review under Section 405(g) is unavailable and that review can be obtained only through a writ of mandamus. See *Dietsch* v. *Schweiker*, 700 F.2d 865, 867-868 (1983).

In contrast, two other circuits have concluded that Appeals Council dismissal orders are reviewable under Section 405(g). In *Bloodsworth*, the Eleventh Circuit held that a decision of the Appeals Council dismissing a request for review as untimely was a reviewable "final decision" under Section 405(g). See 703 F.2d at 1236-1239. The court explained that an Appeals Council decision, "whether it is a determination on the merits or a denial of [a] request to review, is binding and final and appeal therefrom is available to any party as a matter of statutory right under section 405(g)." *Id.* at 1237.[11] The Eleventh Circuit does not appear to have departed from *Bloodsworth*. See *Stone* v. *Heckler*, 778 F.2d 645, 648 (1985) (distinguishing *Bloodsworth* but stating that "it remains binding precedent in this circuit").

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[11] *Bloodsworth* inaccurately stated that SSA's regulations drew no "distinction in regard to rights of judicial appeal between dismissals and determinations on the merits by the Appeals Council." 703 F.2d at 1237. SSA regulations, then as today, stated that further review of an Appeals Council dismissal order was precluded but that judicial review of an Appeals Council determination on the merits was available. 20 C.F.R. 416.1472, 416.1481 (1982). The Eleventh Circuit made clear, however, that its decision also rested on its interpretation of "the statute" and its conclusion that an Appeals Council dismissal is final within the meaning of Section 405(g). *Bloodsworth*, 703 F.2d at 1237.

The Seventh Circuit recently joined the Eleventh Circuit in holding that courts can review SSA decisions dismissing requests for Appeals Council review as untimely. In *Casey*, the Appeals Council had dismissed a claimant's request for review on the ground that it was not timely filed. 853 F.3d at 323. Recognizing that SSA regulations rendered that decision "supposedly not reviewable," the Seventh Circuit nonetheless reviewed the timeliness determination, explaining that Section 405(g) "'allows judicial review when a claim has been presented and finally decided,' even when that final decision is * * * a dismissal for untimeliness." *Id.* at 326 n.1 (citation omitted).[12]

b. But for the Seventh Circuit's decision in *Casey*, this Court's review might not have been warranted. The disagreement between the Eleventh Circuit's decision in *Bloodsworth* and the decisions of every other court of appeals to address the question until 2017 had existed for several decades, and a possibility existed that the Eleventh Circuit might reconsider the issue and resolve the conflict. In light of the Seventh Circuit's recent decision in *Casey*, however, the issue has taken on new currency, and the division among the circuits is

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[12] The Fourth Circuit's position is less clear. In *Adams* v. *Heckler*, 799 F.2d 131 (1986), the Fourth Circuit held that Section 405(g) does not permit a court to review "the merits" of SSA's benefits decision in an action challenging an Appeals Council dismissal, but it "[a]ssume[d] without deciding that [it] ha[d] jurisdiction to review the Appeals Council's decision to dismiss and refusal to find good cause" and "f[ound] no grounds to reverse" in that case. *Id.* at 133-134. In a later, unpublished decision, however, the Fourth Circuit broadly stated that "[r]efusal to review for failure to file a timely request is not a 'final decision by the Secretary' reviewable under" Section 405(g). *Dillow* v. *Sullivan*, 952 F.2d 1396, 1992 WL 6810, at *1 (1992) (per curiam) (Tbl.).

entrenched and is not likely to resolve itself without this Court's intervention.

The resulting disuniformity warrants resolution by this Court. Social Security claimants in the Seventh and Eleventh Circuits can obtain judicial review of Appeals Council determinations of untimeliness, while claimants elsewhere in the country cannot. See pp. 26-28, *supra*; see also SSAR 99-4(11), 64 Fed. Reg. at 57,689 (acquiescence ruling stating that, because of *Bloodsworth*, "[n]otices sent by the Appeals Council which dismiss requests for review of ALJ decisions will advise claimants in" the Eleventh Circuit "of their right to request judicial review").[13]

The issue is also recurring. Published statistics are not currently available, but this Office has been informed by SSA that the Appeals Council dismissed approximately 4000 cases in Fiscal Year 2017, including approximately 2500 on untimeliness grounds. Barring another impediment to review or a colorable constitutional claim, the question presented in this case would govern the availability of judicial review under Section 405(g) in each of those cases where an applicant contends that the dismissal was erroneous.[14]

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[13] SSA has not yet issued an acquiescence ruling applicable to the Seventh Circuit in light of *Casey*.

[14] Review of certain agency decisions under the Medicare Program is also governed by Section 405(g), see, *e.g.*, 42 U.S.C. 1395ff(b)(1)(A), and the Center for Medicare & Medicaid Services in the Department of Health and Human Services has adopted a regulation similarly providing that "[t]he dismissal of a request for [Medicare Appeals] Council review or denial of a request for review of a dismissal issued by an ALJ or attorney adjudicator is binding and not subject to further review unless reopened and vacated by the Council." 42 C.F.R. 405.1116.

3. This case provides an adequate vehicle to address the question presented. The court of appeals squarely addressed the issue, expressly holding that "an Appeals Council decision to refrain from considering an untimely petition for review is not a 'final decision' subject to judicial review in federal court." Pet. App. 2a-3a. Reversal of that determination would be dispositive and would mean that petitioner is entitled to judicial review.

The fact that the district court and court of appeals—in the course of determining whether petitioner had presented a "colorable constitutional claim"—each considered and rejected petitioner's contention that the Appeals Council violated his due process rights by rejecting his allegedly timely request for review, Pet. App. 8a-13a, 25a, does not render this case an unsuitable vehicle. Both courts addressed the timeliness of petitioner's request for review only through the lens of due process, see *ibid.*, and that constitutional framing may have affected the courts' analysis. Moreover, neither court's consideration of petitioner's due process argument entailed consideration of whether review could extend to the Appeals Council's further determination that petitioner had not demonstrated good cause for missing the deadline for requesting review.

Indeed, the fact that the lower courts' reading of Section 405(g) led petitioner and the courts to reconceptualize his allegation of garden-variety administrative error in constitutional terms is one of the adverse consequences of their approach. Other courts have followed the same approach, entertaining challenges to Appeals Council dismissals if cast as constitutional violations. See, *e.g.*, *Dexter* v. *Colvin*, 731 F.3d 977, 980-981 (9th Cir. 2013); *Callender* v. *SSA*, 275 Fed. Appx. 174, 176

(3d Cir. 2008) (per curiam). The Seventh Circuit recently observed that construing Section 405(g) in a way that "forces courts to resolve constitutional questions unnecessarily, while bypassing statutes, regulations, and principles of administrative law that might suffice to decide the case, has nothing to recommend it." *Boley*, 761 F.3d at 808. "Making jurisdiction turn on the presence of a constitutional argument * * * would lead claimants to present" and courts to adjudicate "unnecessary constitutional arguments," *id.* at 807, contrary to the "fundamental and longstanding principle of judicial restraint," which "requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them," *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

* * * * *

As stated above, although the court of appeals in this case adopted the position the government has long maintained, this case and the now-further-entrenched circuit conflict prompted the government to reconsider that position. For the reasons stated above, the government agrees with petitioner that a decision of SSA's Appeals Council dismissing as untimely a request for review of an ALJ decision after a hearing is a "final decision" subject to judicial review under 42 U.S.C. 405(g). For that reason, if the Court grants plenary review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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